Date: July 17, 1998

Case Nos. 98-ERA-27 & 98-ERA-28

In the Matter of:

JACK WEBB,
Complainant

v.

NUMANCO, L.L.C.,
Respondent

and

JACK WEBB,
Complainant

v.

COMMONWEALTH EDISON,
Respondent

Before: Daniel J. Roketenetz
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These proceedings arise under the provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851 (1988) (the "Act"), and the implementing regulations at 29 C.F.R. Part 24.

On March 20, 1998, the Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") against the above-named Respondents. Following its investigation, OSHA determined that no violation of the Act had occurred as alleged in the complaint. The Complainant was so notified by certified letter dated April 29, 1998. The Respondents were also notified of OSHA's determination on the same date.

In the notice of determination to the Complainant, he was advised that he must file an appeal with the Chief Administrative Law Judge within five calendar days of the receipt of the notification

by facsimile, overnight/next day delivery mail or by telegram.[1] On May 6, 1998, the Complainant sent two facsimile transmissions to the Chief Administrative Law Judge, at 4:16 PM and 4:36 PM, advising pursuant to 29 C.F.R. Section 24.4 (d)(2), that he was requesting a hearing with respect to the adverse findings by OSHA. It is clear that the Complainant's request for a hearing was timely filed within five business days as required by the regulation.

On May 14, 1998, Respondent Numanco filed with the Chief Administrative Law Judge objections to the Complainant's request for a hearing contending that the request should be disallowed as untimely filed and that the determination issued by OSHA stand as the final order of the Secretary of Labor ("Secretary"). As support for its request, Numanco appended a copy of the Complainant's notification of his request for hearing reflecting that the cover letter to Numanco had been written by Complainant's counsel on May 8, 1998, mailed by regular mail three days later on May 11,1998, and received by Numanco on May 14, 1998.

On May 21, 1998, these consolidated cases were assigned to the undersigned for hearing. On review of the file, it appeared that no ruling had been rendered on Respondent Numanco's timeliness objections. Accordingly, on May 22, 1998, I issued an Order to Show Cause to the Complainant why the objections should not be sustained.

On May 29, 1998, Respondent ComEd, filed by facsimile, a request that the Complainant's request for hearing be dismissed as untimely. In support of its request ComEd avers that as of May 29, 1998, it had not been served by any means with the Complainant's hearing request. Thus, it also contends that since the Complainant has failed to comply with the regulatory requirements of service on the parties, the Complainant's request for hearing should be dismissed as untimely and OSHA's determination stand as the final order of the Secretary.

On June 1, 1998, the Complainant, through counsel, filed by facsimile, a response to my Order to Show Cause. Therein, the Complainant argues that the request to dismiss the appeal as untimely should be denied. As grounds for its position, the Complainant contends that notice to the parties of a request for hearing is not jurisdictional and that any such delay, or complete failure to serve a party with notice of appeal does not affect the validity of the request otherwise filed with the Chief Administrative Law Judge in a timely manner. The Complainant relies on Jain v. Sacramento Municipal Utility, 89-ERA-39 (1989) wherein the administrative law judge held, and the Secretary affirmed (Sec'y Nov. 21,1991), that the copying requirements that were in effect under the regulations applicable at that time were merely directive, rather than jurisdictional, and did not defeat a timely request for a hearing filed with the Chief Administrative Law Judge.

1/ The information provided to the Complainant as to the number of days within which to file his appeal with the Chief Administrative Law Judge was incorrect in view of the amendments to 29 C.F.R. Section 24.4 (d)(2), effective March 11, 1998, which changed the filing date from five calendar days to five business days.

Thereafter, on June 5, 1998, by facsimile, Respondent ComEd filed a letter in support of its earlier motion and in apparent response to the Complainant's show cause response related above. In its letter, ComEd states that the Complainant is relying on a superceded version of the service regulations, that the current rule requires timely notice to the parties, that the Complainant has failed to comply with the filing requirements and, therefore, the case should be dismissed.

Lastly, on June 9, 1998, Respondent Numanco filed a response to the Complainant's response to my show cause order. Therein, Respondent Numanco set forth additional argument in support of its original request that the Complainant's request for hearing be disallowed.

I have carefully considered all of the arguments of the parties. Based thereon, the applicable statute and regulations, and the relevant case law, I hereby make the following:

Findings and Conclusions

The relevant parts of 29 C.F.R. Section 24.4(d), provide as follows:

> (2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of the timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.
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> (3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for hearing shall be sent by the party requesting a hearing to the complainant or the respondent, as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service....

As noted above, on March 11, 1998, 29 C.F.R. Section 24.4 was amended in several respects. The time for filing an appeal was effectively enlarged by changing the time for filing from five calendar days to five business days. The acceptable methods of service were explicitly set out to include facsimile (fax), telegram, hand delivery or next-day delivery service. Notably, regular mail was not included as an acceptable means of service for either a request for hearing or for notice of such request on the parties to a proceeding. Provisions for cross-appeals were set forth. Finally, language was added to the rule that "[a] copy of the request for hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing was requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service." 29 C.F.R. Section 24.4(d)(3) The rule previously in effect simply provided that "[c]opies

of any for a hearing shall be sent by the complainant to the respondent (employer)and to the Administrator." 29 C.F.R. Section 24.4(d)(2)(ii)

The undisputed facts in this case reflect that the Complainant made a timely request for a hearing with the Chief Administrative Law Judge using one of the prescribed methods of service. The facts further show that the Complainant failed to serve Respondent Numanco on the same day as the request for hearing, but rather served it with notice on May 14, 1998, using regular mail which, under the regulation, is not an acceptable method of service. Finally, the facts demonstrate that the Complainant has yet to serve Respondent ComEd by any means of service. Neither Respondent alleges any prejudice due to the Complainant's failure of service in accord with the applicable regulation. The Complainant asserts no equitable considerations. Thus, the issue before me is whether in view of timely request for hearing to the Chief Administrative Law Judge, the Complainant's failure to serve the Respondents with a copy of the request, in a timely manner or by an acceptable method, defeats jurisdiction to hear this matter, in the absence of a showing of prejudice to the Respondents.

Contrary to the arguments of the Respondents, the complainant contends that the changes to the regulation insofar as service of copies of the hearing request on the parties are largely cosmetic and do not change the holding of the Jain case, *supra*, upon which he relies. In Jain, as pointed out by the Complainant, the administrative law judge found that the copying requirement of the regulation was not jurisdictional because it was not linked to the finality of the Administrator's findings. Therefore, the administrative law judge found that the jurisdictional requirements of the regulation had been satisfied simply by a timely filing of a request for hearing with the Chief Administrative Law Judge and that any prejudice to the respondent therein had been precluded by a continuance of the hearing.

For want of a better term, the regulations in effect at the time of the Jain decision were more "loosely" drafted. Other than the word "shall", the regulations did not require service "on the same day as the hearing is requested" or set forth any specific manner of service on the parties. Thus, it appears to me that the recent amendments to the regulations were more than cosmetic as contended by the Complainant. Moreover, the Complainant's argument amounts to a contention that the service requirements of the current regulations have no impact on whether he is entitled to a hearing from a jurisdictional standpoint as long as the request for one is timely served on the Chief Administrative Law Judge. The logical extension of this reasoning renders the service requirement of the regulation to be superfluous and basically meaningless. The Complainant certainly seems to be testing the efficacy of the current regulation by the facts that Respondent Numanco was not timely served by any acceptable means of service and that the Complainant has yet to effect service on Respondent ComEd.

Although the Board has not interpreted the application of the service requirements in the current regulation, it appears plain to me that the amendments were designed to be deliberately stringent on the matter of service. Undoubtedly, the Secretary was aware of the more permissive interpretation of the then regulations accorded under the Jain decision a decade earlier. In

promulgating the new regulations the Secretary could have chosen to not make any changes or to have adopted the earlier reasoning of Jain. Instead, the service requirements were made more definitive. As stated in the explanatory notes to the promulgated regulations, "Sec. 24.4(d)(3) is revised to make it clear that service of copies of the appeal must be done by the party appealing." 63 Fed. Reg. 6613, at 6617 (Feb. 9,1998) The compulsory language of the regulation in the context of the underlying intent of the language leaves little room for interpretation. The service requirement language in the regulation clearly says what it means. It is apparently the Complainant's position that the regulation does not mean what it says.

Subsections (2) and (3) of the current regulation, when read separately, appear to be unequivocal. Understanding the interplay between the two sections is another matter, however. It may well have been an appropriate reading of the earlier sections to view them as addressing different issues, as in Jain, *i.e.*, one paragraph dealt with the jurisdictional requirement to perfect an appeal, while the next section was merely directive on the matter of service of notice of the appeal to the other parties. I do not believe that the current regulation lends itself to the same flexibility. While Subsection (2) of the current regulation still mentions finality, the section also includes the rather significant amendment providing for cross-appeals by the parties to be filed within five business days of a timely request for a hearing by another party. Subsection (2) of the current regulation also addresses the issue of the operativeness of OSHA's determination upon the filing of a timely request for a hearing. Both of these amendments to the regulations are time sensitive being dependent not only on an initial timely request for hearing to be filed, by one of the prescribed methods, but also on timely notice to the other parties to the proceeding so that they may comport with the time constraints for a timely cross-appeal or not take any action pursuant to the OSHA determination that might not have otherwise been required.

Thus, I find that Subsections (2) and (3) of the current regulation must be viewed in pari materia, *i.e.*, the sections must be read, construed and applied together in order to understand the intent of the Secretary in promulgating them. Application of this rule of statutory construction obviates any misunderstanding or ambiguities that might otherwise exist. Simply stated, a party who requests a hearing before an administrative law judge must follow the regulations precisely in order to perfect an appeal. Although, unlike the earlier regulations, this approach elevates the matters of service and the acceptable means of service to a jurisdictional level, rather than separating them into jurisdictional versus directive considerations, it is my belief that this is the result intended by the Secretary in the current regulations. I also find that a party's failure to properly serve an opposing party in accord with the regulations gives rise to inherent prejudice to the opposing party because the failure of service affects the opposing party's ability to respond to an appeal by a timely cross-appeal or may cause the party to rely on an OSHA finding which is inoperative.

That the new regulations are to be strictly construed is buttressed by two recent opinions of the Board. In Degostin v. Bartlett Nuclear, Inc., 98-ERA-7 (ARB May 4,1998), the Board reiterated that the time limit for filing a request for a hearing must be strictly construed, citing, Backen v. Entergy Operations, Inc., 95-ERA-46 (ARB June 7, 1996), slip op., at p.4; and, Crosier v. Westinghouse Hanford Co., 92-CAA-3, (Sec'y Jan 12, 1994), slip op., at p. 10. Id., slip op., at p. 3.

In Staskelunas v. Northeast Utilities Co., 98-ERA-8 (ARB May 4, 1998) the Board held that the whistleblower protection provisions require expedited filing and that a complainant who relies on alternate means for delivery, *e.g.*, by mail, assumes the risk that the request may be received beyond the due date. Further, the Board also stated in Staskelunas, in interpreting the term "receipt" in 29 C.F.R. Section 24.4(d)(2), that it should be interpreted "literally". Id., slip op., at p. 4, footnote 5. It would be disingenuous to find that part of the current regulation should be interpreted literally in one part and only accorded lip-service in another.

Based on the foregoing, I find and conclude that the Complainant has failed to perfect a timely appeal in this case by failing to properly serve the Respondents either in a timely manner or by an acceptable method of service. My conclusions herein are based on the apparent intent of the Secretary to make the matters of filing and of service jurisdictional in nature and to apply the regulations strictly as written. If there is to be any other interpretation of the current regulations it will have to come from the promulgator.

Recommended Order

It is hereby recommended that the Complaint of Jack Webb be dismissed for failure to file a timely request for hearing and that the determination rendered by OSHA become the final order of the Secretary.

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).